

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**THYME HOLDINGS, LLC, D/B/A WESTGATE  
GARDENS CARE CENTER**

**Employer**

**and**

**Case 32-RC-183272**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 2015**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Thyme Holdings, LLC d/b/a Westgate Gardens Care Center (the Employer) operates a nursing home in Visalia, California. Petitioner Service Employees International Union, Local 2015 (Petitioner) seeks to represent a unit of all full-time and regular part-time licensed vocational nurses (LVNs) employed by the Employer at that Visalia facility. There are approximately 22 full-time LVNs and 15 part-time or on call LVNs in the petitioned-for unit. The Employer contends that the petition should be dismissed because all of the 37 petitioned-for LVNs are supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended (the Act). The Employer argues that the LVNs supervise certified nursing aides (CNAs). There are approximately 80 CNAs at the Employer's facility.<sup>1</sup>

A hearing officer of the Board conducted a hearing and both parties submitted briefs. I have considered the evidence and arguments presented by the parties at the hearing and in their respective briefs. After carefully reviewing the record evidence and Board law, I find that the unit sought by Petitioner is appropriate for collective bargaining. As explained below, I conclude that the Employer did not meet its burden to demonstrate, by a preponderance of the evidence, that LVNs are supervisors within the meaning of Section 2(11) of the Act.

**STATEMENT OF FACTS**

I will first provide a brief overview of the Employer's facility. I will then set forth the basic framework of analysis that the Board uses in determining supervisory status, after which I will set forth the evidence as to those supervisory indicia that the Employer argues are applicable to LVNs. Finally, I will apply the Board's current case law to this evidence and explain my conclusions.

---

<sup>1</sup> The parties agreed to exclude the following classifications from any unit found appropriate by the Regional Director: the minimum data set (MDS) department employees, the Director of Staff Development, the Administrator, the Director of Nursing, the Assistant Directors of Nursing, professional employees, office clerical employees, guards and supervisors as defined in the Act.

The Employer operates a 140-bed skilled nursing home which provides care for short-term rehabilitation patients and long-term permanent residents. The residents of the facility are generally categorized as either requiring skilled nursing or custodial care. The Employer's average daily census is approximately 136 patients. The facility contains a dining room, lobby, laundry facility, boiler room, maintenance office, physical therapy room, and other areas. The facility is a one-story building with two main corridors and three nurses' stations. Nurse station 1 covers resident rooms 1 through 26, nurse station 2 covers resident rooms 27 through 50, and nurse station 3 covers resident rooms 51 through 75.

The Employer's Administrator and highest ranking on-site manager is Eric Tolman. Tolman reports to Employer Branch President Steven Jones, who works at the Employer's corporate office. Directly under Administrator Tolman in the patient care/nursing division are Director of Nursing (DON) Stacey Sheehan, an RN; Assistant Directors of Nursing (ADON) Diane Scott and Lupe (Last Name Unknown), both of whom are LVNs; Director of Staff Development (DSD) Kulsum Hussain, an LVN; and the NOC Shift Supervisor (the position is currently vacant but will eventually be staffed by LVN Denise Kaundart). Directly under them are 12 RNs and the LVNs who are the subject of this petition.<sup>2</sup> According to Administrator Tolman, the DON, ADONs and DSD all work during the day shift on Monday through Friday. Therefore, during nights and weekends the LVNs and the Charge Nurse RNs are the persons of highest authority at the facility. However, it is clear from the record that at all times when the DON and ADONs are not physically present, an admitted supervisor above the level of an LVN is on call. Moreover, the record does not establish what additional authority, if any, the LVNs on the night and weekend shifts possess.

### **BURDEN OF PROOF AND BOARD'S STANDARD FOR ESTABLISHING SUPERVISORY STATUS**

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend

---

<sup>2</sup> It is undisputed that all 12 of these RNs are classified as charge nurses. At the hearing, the Employer and its witnesses also referred to the employees working in the disputed classification of LVN as "charge nurses," whereas Petitioner and its witnesses referred to these same employees as just "LVNs." Although the Employer prefers the term charge nurse, it is undisputed that the badges worn by LVNs identify them as LVNs rather than charge nurses. Furthermore, because the term "charge nurse" has some arguable legal significance, and to distinguish the disputed LVNs from other employees, like the RNs, who are also referred to as "charge nurses," in this Decision I shall refer to these disputed employees as simply LVNs.

such action. *Oakwood Healthcare*, 348 NLRB 686, 687 (2006). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohang Steel America*, 277 NLRB 1083, 1084 (1985); see also *Oakwood Healthcare*, 348 NLRB at 687.

Possession of authority consistent with any of the indicia of Section 2(11) of the Act is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1064 (1999); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 n.8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000). The Board requires actual evidence of supervisory authority. Job titles, job descriptions or similar documents are not given controlling weight and will be rejected as mere paper authority, absent independent evidence of the possession of the described authority. See *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (testimony utterly lacking in specificity does not satisfy burden of establishing supervisory status); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (purely conclusory evidence is not sufficient to establish supervisory status).

The burden of proving supervisory status is on the party asserting that such status exists, here the Employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Oakwood Healthcare*, 348 NLRB at 687. As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *Paramount Parks, Inc. d/b/a Star Trek: The Experience*, 334 NLRB 246, 251 (2001). To meet this burden the party asserting supervisory status must provide sufficient detailed evidence of the circumstances surrounding the alleged supervisor's decision making process in order to demonstrate that the alleged supervisor was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status. Any lack of evidence in the record is construed against the party asserting supervisory status. See *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003); *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409; *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n. 8 (1999). Moreover, "[w]henver the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Consequently, mere inferences or conclusory statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Therefore, to the extent that the Employer seeks to rely herein on vague or conclusory testimony from these admitted supervisors to establish supervisory status, I will take into account the Board's caution as to the weight to be given this testimony.

Moreover, when dealing with issues concerning supervisory status, the Board cautions against construing supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect. *Oakwood*, 348 NLRB at 688 (quoting *Chevron Shipping Co.*, 317 NLRB 379, 380-381 (1995)). In *Oakwood*, the Board observed that the term supervisor was not intended to include “straw bosses, lead men, and set-up men,” who are protected by the Act even though they perform “minor supervisory duties.” (citing *NLRB v. Bell Aerospace Company*, 416 U.S. 267, 280-281 (1974)). 348 NLRB at 688. The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who merely give assignment or direction of a routine or clerical nature in overseeing the work of others, and who are not part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). Routine and perfunctory assignment and direction by health care employees to aides incidental to their performance of routine and repetitive daily patient care is not sufficient to indicate independent judgment. *Crittenton Hospital*, 328 NLRB 879 (1999); *Youville Health Care Center*, 326 NLRB 495, 496 (1998); *Loyalhanna Health Care Associates*, 332 NLRB 933, 935 (2000).

To exercise independent judgment, an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or the provisions of a collective bargaining agreement. *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). Independent judgment requires that the decision rise above the merely routine or clerical. *Oakwood*, 348 NLRB at 692.

## ANALYSIS

In the instant case, the Employer admits that the LVNs do not possess the Section 2(11) authority to transfer, lay off, recall, or promote.<sup>3</sup> Instead, the Employer’s contention that the LVNs possess Section 2(11) authority is limited to the claim that the LVNs have the authority to assign; to reward; to effectively recommend hiring; and to discipline or effectively recommend discipline.<sup>4</sup> Accordingly, I will limit my analysis to an examination of the evidence as to these four indicia of supervisory status.

---

<sup>3</sup> Based on the Employer’s brief and its arguments at the hearing, and despite vague references by the Employer to the need for LVNs to hold CNAs “accountable” and for LVNs to be more accountable, I do not understand the Employer to be contending that the LVNs have the supervisory power to responsibly direct the CNAs. Consistent with that understanding, the Employer did not introduce any evidence that any discipline has been issued to any LVN holding that LVN accountable for failing to ensure that a CNA performed the CNAs duties. To the extent that accountability is relevant, it will be assessed in connection with my analysis of the alleged powers to discipline or effectively recommend discipline.

<sup>4</sup> Petitioner requests in its post-hearing brief that the Regional Director take administrative notice of Case No. 32-RC-178169, involving another Employer-related nursing home/skilled nursing facility in Visalia near the Employer’s instant Westgate Gardens facility called Redwood Springs Healthcare Center. Based on the parties’ briefs and a colloquy between counsel at the hearing, it appears that Petitioner would have the Region conclude that the Employer promulgated and disseminated a July August 2016 charge nurse job description with the express intent

A. The Authority To Schedule and Assign Work:

Staffing Coordinator/Scheduler Amanda Pacheco prepares the schedules for both LVNs and CNAs, although that schedule is then approved by DON Stacey Sheehan. Administrator Tolman in fact testified that the DON “manages the scheduling of all of the nursing in the building” and is “the final on all of it.” There are also Daily Assignment Sheets prepared by LVNs on the shift immediately prior to the shift where such assignments are fulfilled. However, the record reflects that in filling out such daily assignment sheets, the LVNs simply plug in information that they obtain from the schedule already prepared by Scheduler Pacheco. The assignments include dining room (where residents are able to feed themselves), T/A (total assistance) dining room where the CNAs must assist in the feeding of residents, floor (meaning which CNAs will stay on the floor responding to call lights from residents in their rooms), trays (meaning which CNAs will bring meals on trays to residents who remain in their rooms), and trays and floor (meaning the CNAs who both pass out trays and respond to call lights). To the extent that the Daily Assignment Sheets reflect a rotation of CNAs between dining room, T/A, trays, and trays and floor rather than invariably assigning the same CNAs to the same assignments, DSD Kulsum Hussain testified that the LVNs include such rotations on the daily assignment sheets “to make it fair, to rotate everybody.” There is no evidence that the LVNs engage in such rotations based on any assessment of any particular CNAs skills or training or the suitability of certain CNAs to care for certain patients or residents. Similarly, while an LVN may reassign residents or patients in situations where a CNA has to leave in an emergency or due to a resident being admitted, discharged or transferred to a hospital there is again no evidence that the LVN assesses the skills or training of the remaining CNAs or their ability to care for particular patients/residents rather than simply seeking to equalize the workload and/or to preserve an approximate ratio of one CNA per six or seven residents.

In *Oakwood*, the Board interpreted the term “assign” as referring to the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an

---

of providing the LVNs with 2(11) supervisory powers so as to preempt the unionization of the LVNs at the instant Westgate Gardens facility. While I take administrative notice of the representation petition at Redwood Springs solely for the purpose of noting the June 10, 2016 date on which that petition was filed, and while I note that Employer Administrator Tolman admitted in his testimony that he was aware of the petition and Union organizing drive at Redwood Springs at the time that the Employer “rolled out” and required that LVNs acknowledge receipt of the above-referenced charge nurse job description, I do not need to make any finding with respect to the Employer’s motivation and whether its purpose in whole or in part for clarifying or changing the duties of LVNs and rolling out the 2016 charge nurse job description was to render LVNs supervisory so as to prevent their unionization. Regardless of what the Employer’s motivation was, the relevant inquiry is whether or not the Employer has met its burden of proving that the LVNs at issue possess Section 2(11) authority. However, putting motivation aside, I do find that the limited time period in which the LVNs have ostensibly possessed and/or exercised certain of the powers set forth in their new job description is relevant to the assessment of the extent to which such powers have been actually exercised in practice or merely constitute “paper authority.” See *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 6, n. 25 (discounting evidentiary value of evidence of supervisory power to recommend hiring where process was instituted shortly before hearing and opportunity had not yet arisen to exercise that authority).

employee. *Oakwood*, 348 NLRB at 689; *I.H.S. Acquisition No. 114, Inc., d/b/a Lynwood Manor*, 350 NLRB 489 (2007). However, the authority to make an assignment, by itself, does not confer supervisory status. To establish supervisory authority, the putative supervisor must also use independent judgment when making such assignments. This means that the individual must exercise authority that is free from the control of others, and make a judgment that requires forming an opinion or evaluation by discerning and comparing data. The touchstone is the degree of discretion exercised by the purported supervisor, not whether the discretion involves technical or professional judgment. In *Oakwood*, the Board recognized the spectrum between situations involving little discretion where there are detailed instructions for the actor to follow from situations where the actor is wholly free from constraints. 348 NLRB at 693. While judgment is not independent if it is dictated or controlled by detailed instructions, it is independent where the policy allows for discretionary choices. *Id.* Additionally, the judgment must “rise above the merely routine or clerical” for it to be truly supervisory, even if it is made free of control of others and involves forming an opinion by discerning and comparing data. *Oakwood*, 348 NLRB at 693.

Applying this framework, it is first necessary to consider whether the LVNs make assignments, then if so, whether they use independent judgment in making the assignments. As discussed below, I conclude that to the limited extent that LVNs make assignments, these assignments do not require the degree of independent judgment required by Section 2(11) to support a finding of supervisory status.

I initially find that the record does not support any contention that the LVNs assign employees to a particular time. Instead, the record makes clear that the Scheduler (who also serves as the Staffing Coordinator and Central Supply Department Head) is the person who initially prepares the daily schedules for both LVNs and CNAs. The LVNs do not play any part in determining the start times of the CNAs. Further, the Employer conceded that when on-call CNAs need to be called in to work because a regularly scheduled CNA could not come to work due to an emergency, it is either DSD Hussain or Scheduler Pacheco who calls in the on-call CNAs. There is no evidence that LVNs have the power to ask CNAs to come in to work, much less to require them to come in to work. *Golden Crest Healthcare*, 348 NLRB 727, 729 (2006) (putative supervisor who lacks the power to compel, rather than merely request employees to take a certain action, does not possess requisite supervisory authority). Petitioner witness and LVN Abel Gonzalez also testified without contradiction that he would not have power as an LVN to grant a CNA’s request to change shifts.

Similarly, there is no evidence that the disputed LVNs have the power to assign overtime to CNAs without any input from managers above them such as DON Sheehan, the ADON’s or Administrator Tolman. See *Golden Crest Healthcare*, 348 NLRB 727, 729 (2006). LVNs also lack the authority to approve vacation requests from CNAs. While DSD Hussain initially testified that an LVN could authorize a sick CNA to leave work and go home without the approval of a higher level supervisor, Hussain then detracted from such testimony by indicating that normally Scheduler Pacheco or DSD Hussain would become involved in such a situation

and would ultimately be the person to permit the sick CNA to go home.<sup>5</sup> Moreover, LVN Gonzalez testified that he did not believe that he had authority to send a sick CNA home and that he would have had any such CNA obtain permission to go home from the DSD, DON or ADON rather than from Gonzalez. In any event, even if I were to find that LVNs had power to permit a sick CNA to go home without consulting or receiving approval of a higher level supervisor, I would not find this to be a sufficient basis on which to find supervisory status. See *Kent Products*, 289 NLRB 824 (1988) (individual who had authority to allow employees to leave work early due to illness or medical appointments but who could not authorize days off was not supervisor). It would seem self-evident that a sick employee cannot continue to work, especially in a healthcare facility, and acknowledgment of this fact by an LVN does not require sufficient independent judgment to establish that such LVN possessed supervisory authority.

With respect to assigning CNAs to a place or significant overall duties, the evidence again establishes that the nurses' stations to which CNAs are assigned and the duties which CNAs are assigned (dining room, total assistance dining room, floor, trays, or trays and floor) are set forth either on the schedule prepared by Scheduler Pacheco or are transferred from that schedule to the daily assignment sheets prepared by the LVNs. On occasion, an LVN will fill out the daily assignment sheet simply by plugging in the information from the daily assignment sheets from recent days. Scheduler Pacheco also determines which CNAs work with which LVNs. CNAs routinely assist LVNs and vice versa with various aspects of direct patient care.<sup>6</sup> This may involve the LVN assigning a discrete task to a CNA. However, LVNs' authority to assign these discrete tasks in these circumstances is akin to the "ad hoc assignments" described in *Croft Metals*, 348 NLRB 717, 721 (2006). When a unit is short-staffed, there is some evidence that an LVN may pull a CNA from another unit to assist. However, any occasional transfer due to short-staffing is nothing more than the switching of tasks among employees, and does not confer supervisory status. *Croft Metals*, 348 NLRB at 722. In addition, the Employer has not established that the reassignment of a CNA from one nursing unit that is overstaffed to another that is understaffed involves anything more than the mere equalization of workloads which the Board has found does not require the exercise of independent judgment. *Oakwood*, 348 NLRB at 693-694.

Even if I were to find that the record reflects that LVNs assign CNAs to significant overall duties, I would not find that the Employer has met its burden of demonstrating that the LVNs exercise independent judgment in the course of doing so. An LVN exercises independent

---

<sup>5</sup> While the Employer sought to overcome such testimony on redirect examination by seeking to elicit from Hussain evidence of a situation in which Hussain as an LVN permitted a CNA who wasn't feeling well and whose blood pressure was high to go home, I do not find such testimony compelling given Hussain's statement that she may have texted the then-DSD about the departure of the sick CNA before the CNA left the Employer's premises.

<sup>6</sup> LVN Gonzalez also testified that on occasions where a CNA does not carry out his request that the CNA perform a task, Gonzalez will sometimes simply perform the task himself rather than order the CNA or another CNA to do it. Although no party introduced a job description for CNAs into the record, it is apparent from the uncontradicted testimony of LVN Abel Gonzalez that both LVNs and CNAs work side by side performing many of the same patient care duties (apart from the administration of medication that CNAs are not licensed to do). See *Latas de Aluminio Reynolds*, 276 NLRB 1313 (1985) (putative supervisors and supervisees performing many of the same duties militates against a finding of supervisory status).

judgment when she makes assignments based on his/her analysis of an available CNA's skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching the CNA to the condition and needs of a particular patient. *Oakwood Healthcare*, 348 NLRB at 695. The evidence must establish that LVNs make assignments that are both tailored to patient conditions and needs and a particular CNA's skill sets. Merely conclusory testimony that staffing needs are based on an assessment of "patient acuity" is insufficient to establish independent judgment. *Lynwood Manor*, 350 NLRB 489, 490 (2007). In the instant case, there is no discussion of patient acuity in the record. Moreover, there was simply no showing that any LVN took any CNA's skills or talents into account in determining to which patients and/or nurse's station a CNA would be assigned. Accordingly, I find that to the limited extent that LVNs assign certain CNAs to certain patients or duties, these assignments do not require independent judgment on the part of the disputed LVNs. Decisions made on the basis of well-known and limited skills are simply a routine matching of skills to requirements and do not require meaningful discretion. *Franklin Hospital Medical Center d/b/a Franklin Home Health Agency*, 337 NLRB 826, 831 (2002); *Clark Machine Corp.*, 308 NLRB 555, 555-556 (1992). See also *Loparex LLC*, 353 NLRB 1224, 1225 (2009) (shift leaders' authority to direct employees to work on particular machines did not amount to assigning but instead was ad hoc instruction that employees perform discrete tasks, where shift leaders only sometimes considered capabilities of crew members, sometimes made decisions randomly, and sometimes left crew members on same machines day after day).

In sum, the CNAs' duties are simply a function of their classifications and are performed without significant instruction or oversight by an LVN. To the extent that LVNs occasionally assign duties to CNAs on their shifts, they do so without independent judgment. In this regard, the CNAs duties are routine and well-known and based on their title rather than on any particular expertise. The record evidence does not establish that CNAs' respective skills differ significantly or that, in making assignments, it is necessary for the LVNs to consider the relative skills or strengths of the CNAs trained on a particular task. *Barstow Community Hospital*, 352 NLRB 1052, 1053 (2008) (employer's evidence devoid of any examples or details of circumstances showing that putative supervisor in assigning nursing staff actually weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel). This lack of specific evidence is construed against the Employer. *Golden Crest Healthcare Center*, 348 NLRB 727, 731; *Avante at Wilson*, 348 NLRB at 1057 (2006); *Michigan Masonic Home*, 332 NLRB 1409 (2000).

For all of these reasons, I conclude that the Employer has failed to demonstrate that the disputed LVNs possess the 2(11) authority to assign in the interest of the Employer using independent judgment.

#### B. Reward

The Employer next asserts that the LVNs possess the supervisory authority to reward insofar as the Employer has recently assigned to LVNs the task of filling out Employee Performance Reviews for CNAs. However, the authority to evaluate or review is not one of the

Section 2(11) supervisory status criteria. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536-537 (1999). Rather, the relevant inquiry is whether or not an evaluation by itself affects the wages and/or job status of the employee being evaluated. If it does not, then the individual preparing such an evaluation will not be found to be a statutory supervisor. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002). Supervisory status is established only if there is a direct correlation between the evaluations and merit increases received by the evaluated employees. *Hospital Medical Center*, supra; *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997).

The Employer submits that such a direct correlation exists in this case. In support of this assertion, the Employer relies upon Employer Exhibit 7, which consists of 75 single-sheet Employee Performance Reviews bearing a range of dates from April 24, 2016 to September 2, 2016.<sup>7</sup> Administrator Tolman testified that he convened a staff meeting with ADONs and LVNs sometime in July 2016 with a purpose of informing employees that LVNs would be assuming a new duty of preparing performance evaluations of CNAs, that LVNs would be receiving a 1% wage increase as a result of assuming these new duties, and that such evaluations would “be directly correlated” to any raises received by CNAs. DSD Hussain was responsible for collecting the evaluations and making sure they were completed. However, the Employer did not call any LVNs as witnesses to corroborate the testimony of Tolman that the Employer informed LVNs that their future evaluations of CNAs would impact CNA raises.<sup>8</sup> Nor is there evidence in the record that any CNAs were present for the meeting at which the Employer informed LVNs of their new evaluation responsibility. To the extent that the Employer offered evidence of two separate alleged meetings with CNAs (as opposed to LVNs) for the purpose of informing CNAs that LVNs were their putative supervisors and would from then on be responsible for preparing their evaluations, I give little weight to the August 31, 2016 meeting since the vast majority of evaluations put into evidence by the Employer predated this August 31 date on which the Employer supposedly apprised CNAs of the fact that LVNs would be preparing their evaluations. With respect to the other Employer meeting with CNAs that took place on an unspecified date in July, I note that the Employer failed to call as a witness any CNA to corroborate Tolman’s account of the meeting. Nor did the Employer offer into evidence any

---

<sup>7</sup> Like the performance evaluations in *Loparex LLC*, 353 NLRB 1224, 1225 (2009), the performance evaluations in this case do not on their face contain any recommendation regarding raises, promotions or any other type of employee reward. In *Loparex*, even though the disputed shift leaders actually filled out the performance evaluation forms, the Board nevertheless found that the shift leaders’ completion of evaluation forms was primarily a reporting function and, therefore, did not constitute the power to reward or effectively recommend rewards for employees. 353 NLRB No. 126, slip op. at 15.

<sup>8</sup> Nor could DSD Hussain corroborate any of Tolman’s testimony with respect to what he said at this meeting as she was not in attendance at this meeting even though she was an LVN rather than DSD at this time. Further, when Hussain attended a one on one meeting with the DON for the same purpose as the previous group meeting she missed, Hussain recalled the DON telling her that the LVNs would be exercising the new power of evaluating CNAs but did not recall the DON telling her that such evaluations would affect the CNAs’ wages. Like Hussain, LVN Gonzalez also denied that Tolman informed him in a one on one meeting to discuss the new performance evaluation duty that such evaluations by LVNs would have any impact on CNA wages or raises. Gonzalez in fact denied that Tolman informed Gonzalez that LVNs would be preparing performance evaluations of CNAs at all. Gonzalez was consistent in his testimony that the Employer did not make him aware that any CNA evaluations he prepared would have any impact on CNA raises.

sign-in sheets for any mandatory or non-mandatory staff meetings despite the Employer's usual practice of having attendees sign-in on such sheets at meetings they attend.

Petitioner witness and LVN Abel Gonzalez testified without contradiction from the Employer that he was not particularly familiar with the work of some of the CNAs who the Employer asked him to evaluate, which is confirmed by Gonzalez on the face of the evaluations themselves, and that the Employer gave Gonzalez very little time to complete and return the evaluations.<sup>9</sup> Gonzalez's testimony in this regard is consistent with that of Employer witness Hussain that she would generally ask LVNs to return the completed evaluations on the same day that she provided the mostly blank (other than the name of the CNA being evaluated) forms to them. Both Employer witness Hussain and Petitioner witness Gonzalez also admitted that given the differing schedules of LVNs and CNAs, it can be difficult to find LVNs who are qualified to rate CNAs.<sup>10</sup> Nor did the Employer inform Gonzalez when giving him the blank performance evaluation forms to fill out that such evaluations would or could affect the wages of the CNAs being evaluated.

A substantial number of the evaluations contain only checkmarks in boxes rating CNAs as excellent, good, satisfactory, fair or poor in job knowledge, work quality, attendance/punctuality, initiative, communication, dependability and overall rating, with no narrative comments by the reviewing LVN whatsoever. Certain of the evaluations do not contain any review date. To the extent that LVNs were required to use this preprepared evaluation form, the subsequent utilization of such form does not reflect the exercise of independent judgment on the part of the LVNs.

Most importantly, even assuming arguendo that the lack of instructions from DSD Hussain to LVNs regarding how to fill out such evaluation forms created an opportunity for LVNs to exercise independent judgment and their "own standards" in the course of filling out such evaluations, and even acknowledging the testimony from Gonzalez that he had the ability to evaluate the performance of CNAs after having worked a certain number of shifts with them, I nevertheless find that the Employer has failed to meet its burden of demonstrating that these evaluations from LVNs resulted in raises for CNAs without an independent intervening assessment of the CNAs by the Administrator and/or the DSD. The Employer's conclusory testimony that the LVNs prepared evaluations which immediately led to 1% raises for those CNAs deemed fair, 2% raises for those CNAs deemed good, and 3% raises for those CNAs deemed excellent, has not been substantiated given the lack of documentary evidence in the record.<sup>11</sup> First, I note that on several of the evaluations (e.g., those of CNAs Manuel Fernandez,

---

<sup>9</sup> There is no evidence or apparent contention that the LVNs played any part in determining which CNAs they would be assigned to evaluate. The record reflects that it was DSD Hussain who made the determination of which LVNs would evaluate which CNAs based on Hussain's own assessment of how frequently a given LVN had had the opportunity to work with a given CNA.

<sup>10</sup> There is no evidence in the record that the Employer provided any LVNs with the personnel files of any CNAs in an effort to assist the LVNs in preparing the performance evaluations of the CNAs.

<sup>11</sup> There is no evidence or apparent contention that the LVNs played any part in the Employer's overall decision to give 1% raises to CNAs deemed fair, 2% raises for CNAs deemed good, or 3% raises for CNAs deemed excellent.

Wanda Mathews, Jeremy Tompkins, Priscilla Gutierrez, Yesenia Peralta, Sarah Garcia, Somchith Xaivong, Rosamaria Ramos, Maria Saldana, Sheryl Rivera, and Nancy Alcaraz), the reviewing LVN did not check any box or make any notation as to the overall rating to be given to the evaluated CNA.<sup>12</sup> Thus, at least as to these employees, it was left to the DSD to make the determination of the overall rating of such employees and consequently whether they received a 1%, 2% or 3% raise, a fact directly confirmed by DSD Hussain on direct examination by the Employer. There is also no evidence in the record that the Employer ever went back to any LVN and asked him or her to complete the overall rating box that was initially left blank. Second, in comparing Employer Exhibit 7 to Employer Exhibit 8, despite the testimony from DSD Hussain that Employer Exhibits 7 and 8 should “correlate one hundred percent,” it is apparent that there are a substantial number of CNAs who received overall ratings (and raises) that were different from the overall rating that the LVN who completed their evaluation had assigned them. For example, the evaluation of CNA Jalissa Alvarado contains an overall rating of good, which should have led to a 2% raise, but Employer Exhibit 8 reflects that she ultimately was given only an overall rating of fair and a 1% increase. Similarly, the evaluation of Tracie Alva shows that although she was given an overall rating of excellent, she was ultimately only rated as good and given a raise of 2%.<sup>13</sup> Comparing Employer Exhibits 7 and 8 reveals discrepancies in seven other cases regarding the overall ratings and raises recommended by the LVNs compared to the ultimate evaluations and raises awarded to those employees. Once again, such evidence strongly suggests that it was the Administrator or DSD rather than the LVNs who retained ultimate control over the ratings received by the CNAs and consequently the amount of their raises. Third, there are several evaluations where the evaluating LVN unexplainably used a number system rather than simply checking the boxes on the form.<sup>14</sup> In such circumstances, it again appears that it was left to a person other than the LVN to assign a final ranking to the evaluated CNA based on the Employer’s analysis of how the numbers used by the LVN corresponded with the predetermined 1%, 2% and 3% raises for evaluations of fair, good and excellent respectively.<sup>15</sup> Fourth, there are several evaluations in the record that lack evidentiary value because the names of the evaluated CNAs shown (Dawn Forester, Sophia Clark, Elida Notarnicola, Gabriela Basurto, and Stephanie Lopez) are entirely missing from Employer Exhibit 8, such that there is no way to ascertain the overall rating of such employees or if they received any raise at all.

---

To the contrary, Administrator Tolman conceded that he made the decision that CNAs would receive 1%, 2% or 3% raises.

<sup>12</sup> This failure to complete the overall rating section on these evaluations at least calls into question the testimony from DSD Husain that she did not have to follow up with any LVNs after they filled out the evaluations and that the LVNs “pretty much did what we asked for.”

<sup>13</sup>

<sup>14</sup> See Employer Exhibit 8 (Evaluations of Amber Rodriguez, Tracie Alva, Lanora Enas, Lina Hernandez, Anita Pacheco, Rosamaria Ramos, Brice Nielsen, Elida Notarnicola, Gina Aguirre, and Sheila Seechan).

<sup>15</sup> Although CNA Tracie Alva’s evaluation had five boxes with “5” in them for excellent and only two boxes with “4” for good, Alva received an overall rating of good and only a 2% raise. Similarly, although CNA Sheila Seechan’s evaluation had four boxes with “5” in them for excellent and only two boxes with “4” for good, Seechan received an overall rating of good and only a 2% raise. CNAs Anita Pacheco and Cecilia Carabay received overall ratings of 4.5 on their evaluations in Employer Ex. 7, exactly halfway between excellent and good, but Employer Exhibit 8 reflects that they each received an overall rating of good and thus 2% raises. It is not evident from the numbers used on the evaluation of CNA Rosamaria Ramos how she received an overall rating of good.

Finally, I note that the Employer failed to offer any payroll records into evidence to substantiate its claim that the CNAs actually received pay increases as a result of their recent evaluations. The Employer's failure to proffer evidence that is readily available to it is fatal to its argument since, if no such increases were, in fact, awarded, then the Employer's testimony about the LVNs role in the recent CNA appraisal process is clearly insufficient to establish that the LVNs have the authority to reward. Moreover, even if I assume, *arguendo*, that such raises were recently granted, for all of the above reasons, I conclude that the Employer has failed to meet its burden to demonstrate that the disputed LVNs role in the appraisal process was such as to demonstrate that they possess the 2(11) authority to reward employees utilizing independent judgment and/or the authority to effectively recommend such actions.

C. Hiring

It is undisputed that the hiring interviews with respect to candidates for CNA positions have always been conducted and led by DSD Hussain or her predecessor DSD Irasema "Sammy" Gonzalez. It is also undisputed that LVNs played no role in the hiring process prior to around July 2016. However, at a meeting which Administrator Tolman held with staff in July 2016, in conjunction with ostensibly providing LVNs with their new job description, Tolman told the LVNs that they were occasionally going to be pulled from the floor "if they had time," and permitted to participate in hiring interviews of candidates for CNA positions. The record reflects that since that time, there have been at least nine CNA hiring interviews and that five LVNs – i.e. Maria Santillan, Charla Rising, Veronica Vasquez, Lorianne Miller, and Jeanie Cha - have attended at least one of these interviews and filled out the hiring interview forms.

It is well established that the ability to hire or to effectively recommend hiring confers supervisory status only when exercised with independent judgment on behalf of management. See *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). Recommending an applicant for hire contemplates more than merely screening applicants or engaging in other ministerial participation in the interview process. *Bowne of Houston*, 280 NLRB at 1225. Moreover, a putative supervisor who simply advises management about an applicant's work experience or technical skills does not make a hiring decision or effective recommendation in circumstances where management also interviews the applicants and has final hiring authority. *International Center for Integrative Studies/The Door*, 297 NLRB 601, 601-602 (1990) (employee lacked authority to effectively recommend hiring where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with higher-level officials, in applicant interviews); *Aardvark Post*, 331 NLRB 320, 320-321 (2000) (editor was not a supervisor where his function was to let superior know if applicants were technically qualified, while superior determined if they would "fit into" the employer's operation). By contrast, a putative supervisor exercises the power to effectively recommend hire if the supervisor's recommendations are followed with no independent investigation by superiors. *The Republican Company*, 361 NLRB No. 15, slip op. at 5 (2014); *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 3 (2016); *Children's Farm Home*, 324 NLRB 61, 66 (1997) (finding treatment team leaders not to be

supervisors in part because of lack of specific evidence that any employee was granted or denied a wage increase on the basis of a treatment team leader's recommendation); *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994).

In the instant case, it is manifest that the Employer did not satisfy its burden of demonstrating that the LVNs effectively recommend the hire of CNAs. Initially, it is the DSD who screens applications and makes the determination of which CNA candidates will be brought in for a hiring interview, and there is no evidence that LVNs play any role whatsoever in this screening process. It is also the DSD who is ultimately responsible for hiring CNAs. The Employer's assertion that the LVNs have the authority to hire is premised solely on their participation in hiring interviews of applicants for the CNA position. However, the evidence shows that the LVNs' role in these hiring interviews is largely limited to asking applicants a set of five questions contained on a pre-printed form prepared by the Employer, jotting down the applicants' answers to these questions, and then signing the form and handing it back to the Employer. While the Employer's witnesses testified that LVNs are free to go beyond the list of prepared questions, there is no detailed, concrete non-conclusory evidence that any LVNs have in fact asked questions other than the prepared questions, what questions were asked, and whether the applicants' answers to such unrehearsed questions played any part in whether they did or did not ultimately receive the CNA position for which they were applying. That LVNs are quickly pulled into hiring interviews with no prior notice or time to prepare, and only handed the Employer's already established list of questions immediately before the interview, reduces the likelihood that LVNs will have the ability or opportunity to formulate their own independent questions. DSD Hussain also admitted that she is the person who makes the ultimate decision whether or not to hire an applicant. While she testified that after each interview she asks the LVN what they thought of the applicant, the evidence is insufficient to establish that any recommendations made by the LVN are "effective." As such, to the extent that the Employer claims that the DSD depends or relies upon any recommendation from an LVN after the conclusion of the interview of the CNA applicant, there is no evidence (apart from a single incident discussed below which I do not find to be supportive of the Employer's position) of how the DSD relies on the LVNs input. DSD Hussain also admitted that she generally does not bother to inform the LVN whether the Employer ultimately hired the interviewed CNA candidate or not, much less what role the LVNs input played.

Absent additional evidence, an individual does not effectively recommend hiring where acknowledged supervisors (in this case DSD Hussain) also interview the candidates. *J.C. Penney Corp.*, 347 NLRB 127, 129 (2006); *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1387 n. 9 (1998) (technicians-in-charge who interviewed candidates and offered "opinions or recommendations" that were given "significant" weight did not have authority to effectively recommend hiring where a higher level official also participated in the interview and hiring process); *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390, 392 (1989) (licensed practical nurses did not effectively recommend hiring where no contention or finding that the director of nursing relied solely on the LPN's recommendations without further inquiries). The record reflects that DSD Hussain sat in on the entirety of all interviews conducted by LVNs since the Employer asked LVNs to begin participating in hiring interviews, conducted interviews alone

when no LVN was available, and is ultimately responsible for the hiring decision. See also *Northcrest Nursing Home*, 313 NLRB 491, 507 (1993) (that charge nurses may be asked questions by director of staff development falls short of constituting evidence that charge nurses effectively make recommendations affecting job status).

Concededly, the Employer introduced testimony from DSD Hussain that Hussain and LVN Maria Santillan interviewed a CNA applicant (Ramona Last Name Unknown) who did not impress Hussain and who Hussain was not initially inclined to hire. The Employer claims that the ultimate decision to hire this CNA was based on an effective recommendation from LVN Santillan that eventually overcame DSD Hussain's reluctance or resistance. However, I find that this anecdotal testimony does not establish that LVN Santillan effectively recommended the hiring of the CNA. In particular, the evidence strongly suggests that DSD Hussain valued the opinion of LVN Santillan not due to her status as an LVN or because of any questions she asked the CNA applicant Ramona during the interview but rather because of the merely coincidental fact that she happened to work with CNA applicant Ramona at another facility operated by another employer in the past, such that LVN Santillan, irrespective of her LVN status and her participation in the hiring interview, was able to speak to the quality of CNA applicant Ramona's work on a first-hand percipient basis. See *The Republican Company*, 361 NLRB No. 15, slip op. at 6 (2014) (electrical manager not 2(11) supervisor where his role in hiring was limited to assessing the technical skills of the prospective candidates); *The Door*, supra at 601-602; *Aardvark Post*, 331 NLRB 320, 320-321 (2000).

In accordance with the above analysis, I find that the Employer did not meet its burden of demonstrating by a preponderance of the evidence that LVNs effectively recommend the hiring of CNAs in the interest of the Employer using independent judgment.

#### D. Discipline

I now turn to the Employer's contention that the LVNs have the authority to discipline or effectively recommend the discipline of CNAs. The Employer placed into evidence various disciplines ostensibly issued by LVNs to CNAs, including 27 oral counselings, 10 written warnings, and 1 suspension.<sup>16</sup> Notably, there are a substantial number of these disciplines<sup>17</sup> in which the person or persons who filled out the disciplinary form did not check any box or input any information in the section of the form where one notes whether the disciplined employee has had any previous discussion and/or warnings. Similarly, many of these disciplines left the "Summary of Corrective Action" section blank or simply restated the same information from the "Level of Corrective Action" section of the form. There are also a substantial number of these

---

<sup>16</sup> I do not understand any party to be contending that LVNs possess the supervisory power to suspend. The Employer only introduced evidence of one disciplinary suspension (Employer Ex. 6(e)), and neither Administrator Tolman nor DSD Hussain was able to identify all of the signatures on it. Thus, it has not been shown that Employer Ex. 6(e) constitutes an example of an LVN suspending or effectively recommending the suspension of a CNA without any independent review or input from an undisputed supervisor above the LVN.

<sup>17</sup> E.g., Employer Exhibits 6(c), 6(i), 6(j), 6(k), 6(q), 6(r), 6(s), 6(u), 6(v), 6(z), 6(hh), 6(ii), 6(jj) and 6(kk)).

disciplines<sup>18</sup> in which the person or persons who filled out the disciplinary form left blank the area on the form where one would input the “Consequences of Failure to Improve.” There are also disciplines that appear to have additional signatures beyond simply that of the LVN and/or in which such additional signatures could not be identified by the Employer’s witnesses.<sup>19</sup> A significant number of these warnings were for events like an employee coming to work tardy, which suggests that the warning was more akin to a written report documenting a known fact, rather than an actual discretionary discipline. Finally, I note that seven of these disciplines were actually issued by an RN, rather than an LVN, so they are of no probative value to the issue of LVN supervisory status.<sup>20</sup>

To confer supervisory status based on this criterion, the evidence must establish that the putative supervisor’s participation in the disciplinary procedure leads to a personnel action without independent review or investigation by other managerial or supervisory personnel. *Franklin Hospital Medical Center*, supra at 830, citing *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635 (2001). In this regard, the Board has consistently held that the mere exercise of a reporting function that does not automatically lead to further discipline or adverse action against an employee does not establish supervisory authority. See *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997); *Nymed, Inc., d/b/a Ten Broeck Commons*, 320 NLRB 806, 812-813 (1996); *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000) (warning merely reportorial where it simply described incident, did not recommend disposition, and higher authority determined what, if any, discipline was warranted). The Board has also held that the issuance of oral warnings in and of itself does not demonstrate supervisory authority where these oral warnings merely document incidents of poor work performance or behavior, there is no evidence that the oral warnings include any recommendations as to discipline, there is no evidence that these oral warnings play any role in whatever ultimate discipline may be imposed, and the record reflects that an admitted supervisor reviews the matter if a suspension or termination is imposed. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999). The authority to discipline, or to effectively recommend such action, does not exist where upper level management conducts its own investigation of the matter or where upper level management must review the putative supervisor’s disciplinary action or recommendation. *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007); *Nymed, Inc.*, supra at 812-813.

As previously noted, the Employer placed into evidence various disciplines ostensibly issued by LVNs to CNAs, including 27 oral counselings, 10 written warnings, and 1 suspension. As noted above, there are various defects or uncertainties as to these disciplines. Thus, there is

---

<sup>18</sup> E.g., Employer Exhibits 6(c), 6(f), 6(m), 6(q), 6(r), 6(s), 6(t), 6(u), 6(v), 6(w), 6(x), 6(y), 6(z), 6(ee), 6(hh), 6(ii), 6(jj) and 6(kk).

<sup>19</sup> See Employer Ex. 6(e), 6(f), 6(p).

<sup>20</sup> Neither the Employer nor the Petitioner introduced specific evidence in the record as to what job duties and authorities the twelve RNs who work at the facility perform and, particularly, whether their authority is equal to or different than that of the LVNs. This lack of evidence was only exacerbated by the introduction of three competing job descriptions for the LVNs, discussed more fully below in Section F. 3, Secondary Indicia. One of these (Petitioner Ex. 1), is a specific job description for an LVN and it states that the LVN works “under the direct supervision of the RN.” However, the two job descriptions introduced into evidence by the Employer were for the job of “charge nurse,” and on their face they apply both to RNs and LVNs who hold the charge nurse position.

no evidence to establish that these purported oral or written warnings lead to any actual discipline of a CNA or otherwise affect their terms and conditions of employment. There is no evidence to establish that there are any different consequences for labeling something a written warning as opposed to an oral counseling. There is no evidence that the Employer subsequently relied on any of these oral or written warnings to justify more severe discipline. The record evidence is not clear as to how many written warnings an employee may receive before being suspended, or evidence regarding when employees are discharged as a result of having gone through the prior steps of the Employer's progressive discipline system. There are a substantial number of these disciplines in which the person or persons filling out the disciplinary form left blank the area on the form where one would input the "Consequences of Failure to Improve." Most importantly here, each of these alleged disciplines contains a place for the Administrator to sign and the form states that this signature is "required." While Administrator Tolman testified that he does not ordinarily conduct an independent investigation of a discipline that comes across his desk, he did not explain why his signature is required on these forms. Tolman also admitted that he or another higher level supervisor would conduct an independent investigation of a discipline if the disciplined employee were to complain about or challenge the LVNs decision, or if an incident involved alleged abuse of a patient. Tolman also conceded that the DON, ADONs and DSD would be available to consult with an LVN about any disciplinary matter that might arise. Although Administrator Tolman testified that when LVNs come to him about disciplines it is typically to report a discipline they have already imposed rather than to seek Tolman's approval for a discipline not yet imposed, LVN Gonzalez conversely testified that he has conferred with Tolman prior to imposing discipline. LVN Gonzalez also testified that when he brought disciplinary matters to former DSD Irasema "Sammy" Gonzalez, who would often conduct an independent investigation of the situation. Administrator Tolman's testimony, at a minimum, establishes that any discipline issued by an LVN is not final, and therefore is not free from independent review. The Employer also failed to call as witnesses any of the LVNs who signed or filled out a discipline to explain the circumstances surrounding his or her decision to do so. When the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 1-2 (2015); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

There is also no evidence in the record that any of the LVNs have been trained regarding administration of discipline to CNAs. A review of the oral and written warnings introduced into the record shows that they largely consist of incident reports, such as documenting that an employee came to work late or left a patient unattended. The authority to merely point out and correct deficiencies in the job performance of other employees does not establish the authority to discipline. *Regal Health and Rehab Center, Inc.*, 354 NLRB 466, 473 (2009) (citing *Franklin Hospital Medical Center*, supra at 830); *Crittenton Hospital*, 328 NLRB 879 (1999). The Board has recognized that the authority to issue minor corrective actions, such as verbal and written warnings, is too minor a disciplinary function to confer supervisory status when there is no evidence that the warnings form the basis for further discipline or otherwise affect job status. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393-394 (1989) (finding warnings not disciplinary, where employer failed to establish that it had a defined progressive disciplinary scheme under

which the warnings would automatically affect job status or tenure); *Passavant Health Center*, 284 NLRB 887, 889 (1987).

On brief, the Employer disputes this conclusion, arguing that it does use a progressive discipline system in which employees go from being “in serviced” (i.e., trained or informed as to conduct expected of them), verbal warning, written warning, and termination. However, there was no additional testimony about the Employer’s progressive discipline system and there is no mention of it in the Employee Handbook introduced by the Employer. Nor is there any evidence that any of the employees who received an oral counseling or written warning from an LVN subsequently engaged in further misconduct which led to additional discipline, much less any evidence that the Employer relied upon the previous oral counseling or written warning to impose a greater penalty for the subsequent offense.<sup>21</sup> In particular, given the disciplines where the “consequences of failure to improve” section was left blank, in these cases the oral and written warnings simply brought to the Employer’s attention substandard performance by employees without recommendations for future discipline, such that the role of those delivering the warnings was nothing more than a reporting function. *Williamette Industries*, 336 NLRB 743, 744 (2001); *Waverly-Cedar Falls Health Care Center*, 297 NLRB 390, 392 (1989).

In sum, where the numerous disciplines in the record are replete with blank sections, where there is a marked lack of clarity as to who filled out and who signed such forms, and where there is no evidence that the LVNs had access to the personnel files and/or disciplinary histories of the CNAs they were disciplining or proposing to discipline, where there is no evidence that these disciplines were relied upon to justify a subsequent greater degree of discipline, and where the Administrator was required to sign each of these oral and written warnings before they were issued, it is readily apparent that the Employer has failed to meet its burden of establishing that the issuance of disciplines by LVNs at some point will lead to a higher level of discipline. *DirecTV*, 357 NLRB 1747, 1749 (2011) (authority to discipline not established where employer did not introduce evidence establishing the existence of a progressive disciplinary system or otherwise explain how the verbal or written warnings contained in disciplinary notices in the record were linked to future disciplinary action). See also *G4S Government Solutions, Inc. d/b/a WSI Savannah River Site*, 363 NLRB No. 113 (2016); *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 8 (2016) (faulting Regional Director for simply accepting witness testimony describing discipline system as progressive without holding employer to its evidentiary burden). Accordingly, the Employer has not borne its burden of proving the existence of a progressive disciplinary system and the role that the warnings introduced by the Employer play within the system. *Republican Co.*, 361 NLRB No. 15, slip op. at 7 (2014).

---

<sup>21</sup> I consequently find *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007) as cited by the Employer in its brief to be distinguishable. In *Oak Park*, unlike the instant record, the disciplines completed by the purported supervisors were written in detail by the supervisors who met with the DON, ADON and the CNA to discuss the discipline. Further each of the disciplines issued by the purported supervisors in *Oak Park* resulted in the suspension and discharge of the offending employee.

Nor has it been shown by the record evidence that LVNs have effectively recommended discipline. In this regard, LVN Gonzalez testified to situations in which he has approached a DSD with the idea or hope of a CNA receiving discipline yet the DSD then essentially overrode Gonzalez's recommendation and instead concluded that no discipline was necessary and directed that the issue be worked out informally. While the Employer elicited some evidence that DSD's have issued discipline to CNAs based on Gonzalez's recommendation in cases involving insubordination, when the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Finally, even if one assumes *arguendo* that the LVNs disciplined or recommended disciplinary action and exercised a more than reportorial role, there is no evidence that their recommendations were premised upon the exercise of discretion or independent judgment. There is no evidence of any LVNs exercising discretion to jump or skip steps in the Employer's progressive discipline system or to recommend that a step in the disciplinary process be skipped. As to the few disciplines in the record as to which DSD Hussain had personal knowledge, Hussain testified that it was the DON or the DSD who instructed the LVN to issue a discipline to a CNA rather than the LVN independently determining that discipline was appropriate or necessary.<sup>22</sup> I further note that many of the disciplines introduced into evidence involved clear and unambiguous violations of Employer policies (e.g., tardiness, attendance, failure of CNAs to wear gait belts, leaving a patient in soiled condition, ignoring a patient in distress) in which discipline is essentially mandatory, rather than disciplines arising out of more subjective areas.<sup>23</sup> See *Regal Health & Rehab Center, Inc.*, 354 NLRB 466, 474 (2009); *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999) (authority that is limited to situations involving flagrant and egregious conduct does not normally constitute statutory supervisory authority).<sup>24</sup> Thus, the disciplines put into evidence by the Employer fail to establish that the LVNs discipline or

---

<sup>22</sup> See Employer Exs. 6(n), 6(o), 6(t), 6(u), 6(v), 6(w), 6(x), 6(y), 6(hh), 6(ii), 6(jj) and 6(kk).

<sup>23</sup> As to the failure to wear gait belts, DSD Hussain testified that she instructed LVNs including Maria Santillan to do a random check of whether CNAs were wearing their mandatory gait belts. Thus, the issuance of disciplines to CNAs Maria Domingo and Marta Ortega by LVN Maria Santillan (Employer Exs. 6(r) and 6(s)) does not reflect the exercise of independent judgment on the part of LVN Santillan. Rather, Santillan administratively carried out DSD Hussain's order. With respect to various disciplines issued to CNAs based on tardies or attendance violations, the Employer through DSD Hussain testified that only the DSD or Scheduler and not LVNs would have access to the Employer's computerized timekeeping system in order to ascertain whether an employee's tardiness or absences warranted discipline.

<sup>24</sup> In fact, there is evidence in the record that even in situations involving clear and unambiguous misconduct by a CNA (e.g., sleeping on the job), an LVN may have the CNA written up by the DSD rather than writing up the CNA him or herself. There is simply no evidence in the record of any situation in which the Employer criticized an LVN for bringing a disciplinary situation to the attention of the DSD or another high level manager or for the LVN not taking the initiative to discipline a CNA without consulting with some stipulated supervisor. Thus, Gonzalez testified that on each of the five to eight occasions on which he has signed a discipline in the five years he has worked for the Employer as an LVN, he has consulted with someone in management prior to issuing the discipline. I do not find Gonzalez's alleged remark at a mandatory September 9, 2016 meeting with various Employer representatives that Gonzalez has "written up people for the last three years" to be necessarily inconsistent with Gonzalez's testimony that any such disciplines have been issued in consultation with DSD's.

effectively recommend discipline of CNAs in the interests of the Employer utilizing independent judgment.

For all of these reasons, I conclude that the Employer has failed to meet its burden to demonstrate that the disputed LVNs possess the 2(11) authority to discipline or effectively recommend the discipline of employees utilizing independent judgment.

E. The Authority To Adjust Grievances

I also do not understand the Employer to be asserting that the LVNs possess the Section 2(11) authority to adjust grievances. While the Employer's post-hearing brief touches briefly upon the testimony of DSD Hussain regarding the adjustment of grievances, such testimony is insufficiently detailed, conclusory, and, if anything, suggests that Hussain as DSD facilitates resolution of conflicts among CNAs and between LVNs and CNAs rather than the LVNs independently resolving the grievances of CNAs without any DSD involvement. I also note that Gonzalez testified that in situations involving conflict among CNAs or between a CNA and an LVN he normally involves the DSD rather than seeking to resolve the situation himself. The testimony the Employer subsequently elicited from Gonzalez regarding situations in which Gonzalez was able to resolve problems without involving the DSD is too conclusory and lacking detail to make a finding of supervisory power to adjust grievances.

F. Secondary Indicia

In the absence of any compelling evidence of primary indicia of supervisory status, secondary indicia, such as higher pay than other employees, job titles, and attendance at management meetings, are insufficient to establish supervisory status. *Stanford New York LLC d/b/a Stanford Hotel*, 344 NLRB 558 (2005); *Volair Contractors, Inc.*, 341 NLRB 673, 674 n. 8 (2004). See also *Tri-City Motor Company, Inc. d/b/a Auto West Toyota*, 284 NLRB 659, 661 (1987) (higher wage rates for foremen do not conclusively prove supervisory status). In the case before me, I find that the evidence of secondary indicia does not support a finding of supervisory status.

1. Highest Ranking Person Present On Shift:

The Employer argues that LVNs are the highest ranking persons present on certain night and weekend shifts. However, the Board has consistently held that an employee's service as the highest ranking employee on duty is a secondary indicium of supervisory status that, by itself, is insufficient to demonstrate supervisory status. *Loyalhanna Care Center*, 352 NLRB 863, 864-865 (2008); *Golden Crest*, 348 NLRB 727, 730 n. 10 (2006); *Beverly Enterprises, Alabama, Inc., d/b/a Riverchase Health Care Center*, 304 NLRB 861, 865 (1991); *McCullough Environmental Services*, 306 NLRB 565, 566 (1992). Nothing in the statutory definition of supervisor suggests that service as the highest ranking worker on site requires a supervisory finding. *Spirit Construction Services, Inc.*, 351 NLRB 1042, 1043 n. 2 (2007); *Training School at Vineland*, 332 NLRB 1412 n. 3 (2000). The sporadic exercise of supervisory authority is not sufficient to

transform an employee into a supervisor. *Kanahwa Stone Company*, 334 NLRB 235, 237 (2001). Likewise, if an individual does not possess Section 2(11) authority, then the absence of anyone else with such authority does not then automatically confer it. *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 2 (2016). Moreover, the record reflects that an admitted supervisor is always available to consult by telephone. Thus, I do not find the evidence that LVNs occasionally are the highest ranking persons present at times when neither the DON, ADONs, DSD or Administrator are present to support a conclusion of supervisory status in this case. Finally, I note that DSD Hussain admitted that the Employer has daily department meetings attended by virtually all undisputed supervisors at the facility but that LVNs do not attend such meetings.

2. Ratio of Supervisors to Non-Supervisors:

I must also address the ratio of supervisors to non-supervisors if I were to find that the LVNs constitute statutory supervisors as the Employer contends. In the instant case, DSD Hussain testified that the Employer employs 80 CNAs. A ratio of 55 supervisors (i.e., 37 LVNs, 12 RN's, 2 ADONs, 1 DON, 1 DSD, 1 NOC Supervisor, and 1 Administrator) to 80 non-supervisory CNAs is an improbably high ratio that militates against a finding of supervisory status. See *NLRB v. GranCare*, 170 F.3d 662, 667 (7th Cir. 1999) (en banc) (where finding of supervisory status would result in ratio of 59 supervisors to 90 nonsupervisors, "such a highly improbable ratio of bosses to drones 'raises a warning flag'"); *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1555-1556 (6<sup>th</sup> Cir. 1992) (classifying 25% of nursing home staff as supervisors makes ranks of supervisors "pretty populous"); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1468 (7<sup>th</sup> Cir. 1983) (33% ratio found to be high); *Airkaman, Inc.*, 230 NLRB 924, 926 (1977) (one to three ratio is unrealistic and excessively high).

3. The Job Descriptions:

At the hearing, the parties introduced into evidence three separate job descriptions for the disputed LVN classification, these being Employer Exhibit 3 (a Charge Nurse job description showing a revision date of March 1, 2014), Petitioner Exhibit 1 (an LVN job description showing a revision date of March 1, 2014), and Employer Exhibit 14 (a Charge Nurse job description showing a revision date of July 1992). The evidence is mixed with respect to which of these three different job descriptions is the pertinent document. Thus, the LVN job description proffered into evidence by the Petitioner indicates that the LVN is "under the direct supervision of the RN" and "responsible to the Charge Nurse." This LVN job description, on its face, does not list any arguably supervisory duties. By contrast, the 1992 Charge Nurse job description proffered by the Employer states that the Charge Nurse "will direct, supervise and evaluate the duty performance of nursing assistants under their charge;" that the "Charge Nurse reports to and is directly responsible to the Nursing Supervisor;" and that the Charge Nurse will "supervise and evaluate work performance of nursing personnel assigned to his/her area of responsibility." Similarly, the most recent Charge Nurse job description promulgated by the Employer in July or August 2016 contains language ostensibly indicating that the Charge Nurse

has the authority to assign and responsibly direct the work of CNAs, to discipline, and to supervise employees.

I find that the record evidence as to these three disputed job descriptions is so in dispute that it is insufficient to establish conclusively which of these three job descriptions is the current pertinent document. Moreover, Board law is clear that the relevant inquiry is whether a putative supervisor actually exercises supervisory authority, rather than whether that person's job description purports to bestow such authority upon them where that authority has never been exercised. See, e.g., *Northwest Steel*, 200 NLRB 108 (1972); *Hawaiian Telephone Co.*, 186 NLRB No. 1 (1970)(telephone company traffic supervisors not 2(11) supervisors despite enlarged responsibilities and new job title); *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, 788 (1956) (Board found that while a new job description "purported" to confer supervisory authority on a particular class of workers, in fact the employer had "effectuated no material changes in (those employees') functions").

4. Holding Out LVNs to CNAs as Supervisors:

Finally, to the extent that the Employer argues that it has held out the LVNs to CNAs as supervisors, it is well established that an employer's holding out an individual to employees as a supervisor is not dispositive of supervisory status, and an employee will not be found to be a supervisor absent evidence that he or she exercises any of the primary indicia of supervisory status. *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Polynesian Hospitality Tours*, 297 NLRB 228 (1989). Although it is of limited evidentiary value for this reason, I nevertheless note the concession by DSD Hussain that the CNAs consider the DSD rather than the LVNs to be the supervisors of the CNAs in any event.

## CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>25</sup>

---

<sup>25</sup>The Employer in its brief repeatedly makes various arguments that it was not afforded due process by the Hearing Officer and/or Region during the course of the hearing in this matter. Such arguments on brief go far beyond those made by Employer counsel on the record during the hearing. In affirming the Hearing Officer's rulings, I reject the Employer's contentions. Thus, to the extent that any evidence proffered by the Employer was not received, the Employer was given the opportunity to make offers of proof with respect to the purported significance of such evidence, which offers of proof were fully considered and remain in the record. Further, it is manifest that the Employer at all times had the power to call as witnesses (and even to subpoena) any LVNs or CNAs in order to put forth first-hand evidence with respect to the ostensible power or authority of the disputed LVNs to supervise CNAs, and thereby shore up any perceived deficiencies in the record. More specifically, to the extent that the Employer now complains about its alleged inability to call LVN Maria Santillan as a witness, the same principles apply. The Employer could have subpoenaed Santillan at any time and could have asked that the hearing go into a third day in order for Santillan to return. Further, the Hearing Officer correctly ruled that because the Employer's questions to

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>26</sup>

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

B. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

C. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time LVNs employed by the Employer at its Visalia, California facility; excluding all other employees, Minimum Data Set Department employees, Directors of Staff Development, professional employees, office clerical employees, guards, and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015.

---

LVN Santillan would have been exclusively directed to the 1992 charge nurse job description, such evidence would not have been relevant given the other evidence that this charge nurse job description was superseded by the charge nurse job description introduced by the Employer in July and August 2016. While Employer counsel on brief correctly notes the provision of the Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings that “a cross-examiner should normally be permitted to ask a witness questions pertaining to relevant issues raised in the hearing, regardless of whether the subject was raised on direct examination,” that same page of the Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings also dictates that a hearing officer should avoid putting cumulative repetitious testimony in the record. It is evident from the record that at those few moments near the end of the hearing where the Hearing Officer sought to limit the Employer’s inquiry on cross-examination into areas not covered on direct examination, the Employer was merely seeking to explore areas that had already been covered in detail by multiple witnesses, thus mitigating against any harm the Employer might otherwise have suffered. Finally, Employer counsel did not object on the record to the effort by the Hearing Officer to conclude the hearing in two days rather than unnecessarily going into a third day. The Employer could have sought to continue the hearing for the purpose of calling or recalling additional witnesses in order to satisfy itself that it met its burden of proving supervisory status. Having failed to do so, its’ due process arguments on brief ring hollow.

<sup>26</sup> At the hearing, the parties stipulated that the Employer is a California limited liability company engaged in the operation of a skilled nursing facility at its Visalia, California facility. During the past twelve months, a representative period, the Employer derived gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$5,000 directly from sources located outside the State of California.

**A. Election Details**

The election will be held on November 4, 2016 from 1:00 p.m. to 2:00 p.m. and 5:00 p.m. to 7:00 p.m. in the Employer's conference room.

**B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending October 15, 2016, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by October 31, 2016. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on

the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Thyme Holdings, LLC, d/b/a Westgate  
Gardens Care Center  
Case 32-RC-183272

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: October 27, 2016

**/s/ Valerie Hardy-Mahoney**

---

VALERIE HARDY-MAHONEY  
ACTING REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 32  
1301 Clay St Ste 300N  
Oakland, CA 94612-5224